In the Estate of Ngau Ken Lock (deceased) (Ngau Voon Kiat, petitioner)

HIGH COURT (TEMERLOH) — PETITION NO 32–29 OF 2001
RAMLY ALI J
2 JULY 2002

Trusts and Trustees *— Administration of estate — Duties of trustees — Petitioner presented a petition applying for a letter of administration de bonis non — Applicant applied to be appointed as co-administrator — No caveat entered to object to the petition — Whether the petition should be treated as if not objected to — Whether petitioner or applicant was the 'fittest' person to be appointed the sole administrator of the estate — Whether applicant was fit to be appointed the co-administrator*

In a will dated 16 June 1960, the late Dato' Ngau Ken Lock ('the deceased') appointed his wife and his first son to be executors and trustees of the said will. In the said will, the deceased also devised his wife and his five sons his movable and immovable properties to be held by them in equal shares after payment of his funeral testamentary expenses. In other words, there were six beneficiaries to the said will. The said executors were granted a grant of probate to jointly administer the deceased's estate. Both the administrators died leaving behind the estate of the deceased not fully administered. On 28 September 2001, the fifth son of the deceased ('the petitioner') filed the present petition to apply for a letter of administration de bonis non in respect of the unadministered estate of the deceased. On 18 March 2002, the fourth son ('the applicant') filed the present application for him to be appointed as co-administrator of the said estate. All the beneficiaries or their administrators/representatives (except the applicant) had filed their respective affidavits to support the petition and to oppose the application. The petitioner also submitted that since the applicant had failed to enter a caveat to object to the petition, the petition should be treated as if it had not been objected to.

Held, allowing the petition and dismissing the application:

(1) The other beneficiaries either personally or through administrators/representatives had sworn that they had confidence in the petitioner and supported the petitioner's petition and opposed the applicant's application (see p 81D–E). From the affidavit evidence, which was not challenged or contradicted by the applicant, it was clear that it had become common knowledge among the beneficiaries and family members that the applicant could not and would not co-operate with the petitioner in administering the estate (see p 81H–I). In the circumstances, the court was satisfied that the applicant was not the 'fittest' person to be appointed the sole administrator of the estate. He was also not fit to be appointed as co-administrator of the said estate. The court was satisfied, in the circumstances of the

present case, that the petitioner was the 'fittest' person to be appointed as the sole administrator of the said estate (see pp 81I, 82D–E).

(2) The court was of the view that the contention by the petitioner was misconceived, in that even if the applicant had not filed any caveat as required under O 71 r 37(1) of the Rules of the High Court 1980, it did not preclude the applicant from filing the present summons in chambers and it did not preclude the court from dealing with the said summons (see p 82F–G).

[**Bahasa Malaysia summary**

Dalam satu wasiat bertarikh 16 Jun 1960, mendiang Dato' Ngau Ken Lock ('si mati') telah melantik isteri dan anak lelaki sulungnya sebagai wasi-wasi dan pemegang amanah wasiat tersebut. Dalam wasiat tersebut, si mati juga menetapkan isteri dan lima anak lelakinya harta alih dan tidak alih untuk dipegang oleh mereka dalam bahagian yang sama rata selepas perbelanjaan wasiat pengebumian. Dalam ertikata lain, terdapat enam waris kepada wasiat tersebut. Wasi-wasi telah diberikan surat warisan probet untuk mentadbir harta pesaka si mati secara bersama. Kedu-dua pentadbir telah meninggal dunia, membiarkan harta pesaka si mati tidak ditadbir dengan sepenuhnya. Pada 28 September 2001, anak lelaki kelima si mati ('pempetisyen') memfail petisyen ini untuk memohon surat pentadbiran de bonis non berhubung dengan bahagian harta pesaka si mati yang tidak ditadbir. Pada 18 Mac 2002, anak lelaki keempat ('pemohon') memfail permohonan ini agar dirinya dilantik sebagai pentadbir bersama harta pesaka tersebut. Kesemua waris atau pentadbir/wakil mereka (kecuali pemohon) telah memfail afidavit masing-masing untuk menyokong petisyen tersebut dan untuk membantah permohonan. Pempetisyen juga menghujah bahawa oleh kerana pemohon telah gagal memasukkan kaveat untuk membantah petisyen tersebut, petisyen haruslah dianggap seolah-olah ia tidak dibantah.

Diputuskan, membenarkan petisyen dan menolak permohonan:

(1) Waris lain sama ada secara sendiri atau menerusi pentadbir/wakil telah bersumpah bahawa mereka yakin dalam pempetisyen dan menyokong petisyen pempetisyen dan membantah permohonan pemohon (lihat ms 81D–E). Dari keterangan afidavit, yang tidak dicabar atau disangkal oleh pemohon, adalah jelas bahawa ia telah pun menjadi pengetahuan umum di kalangan waris dan ahli keluarga bahawa pemohon tidak dapat dan tidak akan bekerjasama dengan pempetisyen dalam mentadbir harta pesaka tersebut (lihat ms 81H–I). Dalam keadaan ini, mahkamah puas hati bahawa pemohon tidak merupakan calon yang 'paling sesuai' untuk dilantik sebagai pentadbir tunggal harta pesaka. Dia juga tidak sesuai dilantik sebagai pentadbir bersama harta pesaka

tersebut. Mahkamah puas hati dalam keadaan kes ini bahawa pempetisyen adalah 'paling sesuai' untuk dilantik sebagai pentadbir tunggal harta pesaka tersebut (lihat ms 81I, 82D–E).

(2) Pada hemat mahkamah, hujah oleh pempetisyen adalah disalah tanggap, dalam ertikata yang lain, biarpun pemohon tidak memfail sebarang kaveat seperti yang dikehendaki di bawah A 71 k 37(1) Kaedah-Kaedah Mahkamah Tinggi 1980, ia tidak mengecualikan pemohon daripada memfail saman dalam kamar ini dan ia tidak mengecualikan mahkamah daripada menguruskan saman tersebut (lihat ms 82F–G).]

Notes

For cases on duties of trustees, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) para 1716.

Cases referred to

Dampier v Calson (1812) 2 Phill 54 (refd)
HSBC (M) Trustee Bhd v Kong Kim Hoh & Ors [1999] 3 MLJ 383 (refd)
Iredale v Ford (1859) 1 Sw & Tr 305 (refd)
Grundy, Re [1868] LR 1 P & D 459 (refd)
Ramanathan s/o ARA Nachiappan, Re (Administrator de bonis non with the will annexed, of the Estate of KALRM Kuruppan Chettiar, deceased) [1998] 2 MLJ 90 (refd)
Yap Kee Par v Molly Yap & Ors [1996] 4 MLJ 219 (refd)

Legislation referred to

Probate and Administration Act 1959 ss 16, 30
Rules of the High Court 1980 O 71 rr 4(1), 22(2), (4), 37(1), 38

Francis Tan (*Rosni Francis Tan & Ho*) for the petitioner.
TH Goh (*Azhar & Co*) for the applicant.

Ramly Ali J: There are two applications before this court in the present proceedings namely:

(i) encl 8, which is a petition by the petitioner to be appointed the sole administrator of the estate of the deceased (the late Dato' Ngau Ken Lock), under a grant of administration (with will annexed) de bonis non; and

(ii) encl 14, which is an application by the applicant to be appointed as a co-administrator de bonis non jointly with the petitioner.

Background

On 8 March 1978, the late Dato' Ngau Ken Lock died and left a will dated 16 June 1960. In the said will, the late Dato' Ngau Ken Lock appointed his

wife Ee Tian (f) and his first son Ngau Boon Ming to be executors and trustees of the will. In the said will also, the late Dato' Ngau Ken Lock devised to his wife Ee Tian (f) and his five sons namely: Ngau Boon Ming; Ngau Boon Thai; Ngau Boon Kee; Ngau Boon Pin and Ngau Boon Kit, all his movable and immovable properties situated in the Federation of Malaya to be held by them in equal shares after payment of his funeral testamentary expenses. In other words, there are six beneficiaries to the said will, each will get $^1/_6$ of the deceased's properties, in equal shares. Both the petitioner and the applicant are brothers, ie the fifth and fourth sons of the deceased and both of them are beneficiaries to the said will.

The said executors, Ee Tian (f) and Ngau Boon Ming were granted a grant of probate to jointly administer the deceased's estate. The said Ee Tian (f) died on 11 March 1996. After that, the other executor, Ngau Boon Ming became the sole administrator vide court order dated 19 June 1997. On 2 July 2001, the said sole administrator, Ngau Boon Ming died, leaving behind the estate of the late Dato' Ngau Ken Lock not fully administered.

On 28 September 2001, the present petitioner (who is the fifth son and one of the beneficiaries to the estate of the late Dato' Ngau Ken Lock) filed the present petition (vide encl 8) to apply for a letter of administration (with will annexed) de bonis non in respect of the unadministered estate of the late Dato' Ngau Ken Lock. On 18 March 2002, the applicant (who is the fourth son and also one of the beneficiaries of the same estate) filed the present application (vide encl 14), for him to be appointed as co-administrator of the said estate.

The said Ee Tian (f) (died on 11 March 1996) is being represented by the administrator — Ow Yong Mok. Ng Boon Ming (died on 2 July 2001) is being represented by the beneficiaries — wife: Chang Vooi Chin @ Chung Yoke Foong and children: Ngau Wu Chong and Ngam Lily. While Ng Boon Thai (the second son of the late Dato' Ngau Ken Lock who had died on 7 April 1987) is being represented by the administrator — Chong Kim Yew @ Chong Mai. The third son of the late Dato' Ngau Ken Lock, namely Ngau Boon Kee (who is also one of the beneficiaries) is still alive. All the beneficiaries or their administrators/representatives (except the applicant) have filed their respective affidavits to support the petition (vide encl 8) and to oppose the application (vide encl 14).

The administrators/representatives of the first three beneficiaries as well as the fourth beneficiary, Ngau Boon Kee, have each also filed their respective renunciation to be appointed its administrator de bonis non.

On 15 April 2002, the learned senior assistant registrar ordered that this matter be referred to the judge under O 71 r 38 of the Rules of the High Court 1980 ('the RHC'), which says:

> Every contested matter must be referred to a Judge who may dispose of the matter in dispute in a summary manner or direct that the provisions of O 72 shall apply.

The law on administration de bonis non

The term 'de bonis non' comes from the full Latin title of 'de bonis non administratis' which means 'of goods not administered'. If a person to whom a grant of representation has been made has died leaving part or all of the estate of the deceased unadministered then, unless there is a chain of executorship, a grant in respect of the unadministered estate may be made to a new personal representative to enable the administration to be completed. Such a grant is described as 'de bonis non', (see: *Tristram and Coote's Probate Practice*, (28th Ed), p 432 and *Re Ramanathan s/o ARA Nachiappan (Administrator de bonis non with the will annexed, of the Estate of KALRM Kuruppan Chettiar, deceased)* [1998] 2 MLJ 90 at p 99). As described by *Halsbury's Law of England* (4th Ed), para 984, p 514:

> Where a sole or last surviving executor dies intestate without having fully administered the testator's estate, the deceased executor's administrator does not become the representative of the original testator, and it is accordingly necessary to appoint an administrator to administer the goods of the original testator left unadministered. This is a grant of *administration cum testamento annexe de bonis non administratis* (that is 'with the will annexed for unadministered estate').

The learned author of '*Probate and Administration in Singapore and Malaysia: Law and Practice*', G Raman (at p 70), states:

> Sometimes a person who has taken out probate or letters of administration may die without completing the administration of the estate. Where this happens, *the person next entitled to the letters of representative or any other suitable applicant*, would be appointed by the court to finalize the administration of the unadministered part of the estate. The administrator in this sort of cases acts under the will of the deceased in the event of testacy, or, if it is an intestate estate, he derives his authority from his appointment as administrator and carries out the functions of his predecessors. The role of an administrator de bonis non is restricted to finalizing the administration of the estate.

In Malaysia, matters relating to probate and letters of administration are governed by the Probate and Administration Act 1959 ('the Act'). Section 16 of the Act provides:

> Where:
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> (a) no executor is appointed by a will;
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> (b) the executor or all the executors appointed by will are legally incapable of acting as such, or have renounced;
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> (c) no executor survives the testator;
>
> (d) all the executors die before obtaining probate or before having administered all the estate of the deceased; or
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> (e) the executors appointed by any will do not appear and extract probate,
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> letters of administration with the will annexed may be granted to such person or persons as the court deems fittest to administer the estate:
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> Provided that a prior right to the grant shall belong to the following persons in the following order:

A (i) a universal or residuary legatee;

(ii) a personal representative of a deceased universal or residuary legatee;

(iii) such person or persons, being beneficiaries under the will, as would have been entitled to a grant of letters of administration if the deceased had died intestate;

B (iv) a legatee having a beneficial interest; and

(v) a creditor of the deceased.

Section 30 of the Act further provides:

> In granting administration the Court shall have regard to the rights of all persons interested in the estate of the deceased person or in the proceeds of sale thereof, and, in particular, administration with the will annexed may be granted to a devisee or legatee; and in regard to land settled previously to the death of the deceased, and not by his will, administration may be granted to the trustees of the settlement; and any such administration may be limited in any way the Court thinks fit:
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> Provided that, where the deceased died wholly intestate as to his estate, administration shall, if application is made for the purpose, be granted to some one or more of the persons interested in the residuary estate of the deceased, unless by reason of the insolvency of the estate or other special circumstances the Court thinks it expedient to grant administration to some other person.

By reason of s 16 of the Act, both the petitioner and the applicant fell under category (iii) of the 'proviso' to s 16 and were equally entitled in the same order of priority to be appointed administrator de bonis non. However, s 16 also provides that 'letters of administration with the will annexed may be granted to such person or persons as the court deems fittest to administer the estate'.

The court has a wide discretion as to whom it shall grant the letter of administration. Both the Act and the RHC give a wide power to the court in exercising its authority in the appointment of an administrator. In fact, O 71 r 4(1) of the RHC provides that 'the Registrar does not allow any grant to be issued until all enquiries, which he may see fit to make have been answered to his satisfaction'.

Section 30 of the Act gives the court a wide power and discretion as to persons to whom administration is to be granted. This enables the court to pass over a person otherwise entitled to a grant. This has also been stressed by Kamalanathan Ratnam J in the case of *HSBC (M) Trustee Bhd v Kong Kim Hoh & Ors* [1999] 3 MLJ 383, at p 396. As with all discretion, it has to be exercised judiciously and in accordance with established principles. One of the established principles is that this matter which has been referred to this court under O 71 r 38 of the RHC, should be dealt with in a summary manner.

Another principle to be considered is that the estate of the deceased, which is the subject matter of the present applications, must be administered expeditiously and economically. This principle has been established as early as 1868 in *Re Grundy* [1868] LR 1 P & D 459 and was

followed by Vincent Ng J in *Yap Kee Par v Molly Yap & Ors* [1996] 4 MLJ 219. In that case, (*Yap Kee Par*) the judge said at p 225: A

> One object which the court keeps in view is the expeditious and economical administration of estates of deceased persons (see *Re Grundy* [1868] LR 1 P & D 459). No broad rule of law can be laid down as to what the special circumstances are which enable the court to pass over a person otherwise entitled to a grant, each case must be decided upon its own merits, though the special circumstances ought to be confined to only circumstances directly affecting the administration of the estate (see *Re S (deceased)* [1967] 2 All ER 150, *In the Goods of Knight* [1939] 3 All ER 928). Indeed in *In the Estate of Biggs* [1966] 1 All ER 358, a grant of LA to the deceased's niece was made, passing over an executor who had intermeddled but refused to prove the will. And, in *Re Estate of Newsham* [1966] 3 All ER 681, a grant was made, passing over a widow, so as not to prejudice an insurance claim (see also G Raman's *Probate and Administration in Singapore and Malaysia, Law and Practice* at p 51). B C

It is also an established principle that the court will normally recognize the wishes of the majority of the beneficiaries. Section 30 of the Act clearly envisages that 'in granting administration, the court shall have regard to all persons interested in the estate of the deceased person'. This principle is both correct and sound. It seeks to achieve maximum harmony among competing interests. In his book *Probate and Administration in Singapore and Malaysia: Law and Practice*, the learned author G Raman (at p 74) expressed: D E

> Quite often, the court will be required to choose between competing applicants though the applicants may come from the same class. In such instances, the court will look into that section or those numbers of the class who have a larger interest than the competing group. Therefore the majority interest will normally be recognized and granted the letters of representation. F

The learned author cited the cases of *Dampier v Calson* (1812) 2 Phill 54 and *Iredale v Ford* (1859) 1 Sw & Tr 305 to support this preposition.

Applying the above principles and law to the present applications before this court, I have to keep in view the requirement under s 16 of the Act, ie who is the person or persons the court deems fittest to administer the estate? G The petitioner may be deemed 'fit' to administer. The applicant also may be deemed 'fit' to do the same. Both of them may also be deemed 'fit' to jointly administer the estate as co-administers. The task of this court is to decide and determine, based on the above principles, as well as after having regard to the rights and interests of all the other beneficiaries as stipulated under s 30 of the Act, who the 'fittest' to administer the said estate is. There H are three alternatives in the present applications, namely:

(i) the petitioner as sole administrator;

(ii) the applicant as sole administrator; and

(iii) both the petitioner and the applicant as co-administrators. I

Even though the applicant is the elder brother of the petitioner, it is not necessary that he be appointed the administrator. His interest in the estate

as well as the wishes of the other beneficiaries must also be considered. There are certain situations where an applicant may be passed over for someone else who is more 'fit' to be granted the administration. In *Probate and Administration in Singapore and Malaysia: Law and Practice* by G Raman at p 73, it is stated that:

> The normal situations where this may occur are:
> (1) bad character, financial position or ineptitude for business of an applicant;
> (2) the fact that he had an interest incompatible with the proper administration of the estate;
> (3) his minor interest in the estate;
> (4) he is personally objectionable to other persons entitled to share in the estate.

It is also stated in *Williams, Martimer and Sunnucks Executors, Administrators and Probate* (16th Ed, 1982), at p 324, that an applicant may be passed over for someone else if he is personally objectionable to other persons entitled to a share in the estate.

In the present case, the applicant's share in the estate (as provided under the said will) is $^1/_6$. The other beneficiaries (including the petitioner) are entitled to $^5/_6$ shares. Of course the applicant's interest is a minority interest. The other beneficiaries (except the applicant) either personally or through administrators/representatives have sworn their respective affidavits that they have confidence in the petitioner to administer the said estate and supported the petitioner's petition (vide encl 8), and opposed the applicant's application (vide encl 14). It is a reality that a 'leader' or 'representative' who does not enjoy the trust, support and confidence of the people whom he leads or represents would be a disaster, however elevated his academic or job acclaim. This is also true for an administrator as in the present case.

In the present case, there is evidence (as contained in the petitioner's affidavit — encl 27, particularly paras 10 and 11) to show that the applicant is not co-operative in dealing with this matter before this. The applicant has migrated and was residing in Australia. At the time of the last executor, Ngau Boon Ming was in critical condition (before he died on 2 July 2001) and attempts were made by the family members to resolve some problems relating to the estate and to appoint a new administrator. Sufficient notice was given to the applicant (who was then residing in Victoria, Australia), but the applicant failed to respond and to co-operate until the said Ngau Boon Ming died. In fact, the petitioner went to see the applicant in Australia to convey the wishes of the other family members over this matter, but the applicant's response was negative. The evidence has not been challenged or contradicted by the applicant in his affidavit. From the affidavit evidence, it is clear that it has become common knowledge among the beneficiaries and family members that the applicant would not and will not co-operate with the petitioner in administering the estate.

In the circumstances, the court is satisfied that the applicant is not the 'fittest' person to be appointed the sole administrator of the estate of the late

Dato' Ngau Ken Lock. He is also not fit to be appointed as co-administrator of the said estate. To appoint him as the sole administrator may not be to the advantage of all the beneficiaries. It may lead to disaster and colossal blunder. To appoint him as co-administrator together with the petitioner, under the present background, may also lead to the same result, ie disaster and colossal blunder. It is just like allowing two political parties of equal strength but of totally different and conflicting ideologies, to run a single government to administer a country. We all know where it will lead to. Only a miracle can save their destinations. The estate may not be administered expeditiously and economically.

The interests of the majority beneficiaries may be in jeopardy. Therefore, the only alternative left is to appoint the petitioner, who has received the support and confidence of all the other beneficiaries (either directly or through their respective administrators/representatives), as the sole administrator as petitioned (vide encl 8). The estate of the late Dato' Ngau Ken Lock is still left unadministered. The first three beneficiaries have passed away and their respective beneficiaries (in their own respective estates) are obviously anxious to finalize the distribution of the respective estates among their respective beneficiaries. Someone has to be appointed an administrator de bonis non in respect of the estate of the late Dato' Ngau Ken Lock. The estate has to be administered properly and cannot be left idle and unadministered. Therefore, in the circumstances of the present case, the court is satisfied that the petitioner is the 'fittest' person to be appointed as the sole-administrator of the said estate.

Requirement of lodgment of caveat

The petitioner has submitted that any party who intends to object to a petition must first enter a caveat pursuant to O 71 r 37 of the RHC. He further submitted that since the applicant has failed to enter a caveat, the petition is to be treated as if it has not been objected to; and accordingly, the remaining issue was whether or not the applicant should be appointed co-administrator.

This court is of the view that the above contention by the petitioner is misconceived, in that even if the applicant has not filed any caveat as required under O 71 r 37(1) of the RHC, it does not preclude the applicant from filing the present summons in chambers (encl 14) and it does not preclude the court from dealing with the said summons.

Order 71 r 37(1) of the RHC provides that 'any person who wishes to ensure that no grant is made without notice to himself may enter caveat'.

A caveat is a warning or an entry made at the Probate Registry or court to prevent certain steps being taken without previous notice to the person entering the caveat (the caveator). Any person having or claiming an interest in the estate of a deceased person may enter a caveat at the Probate Registry to prevent a grant of representation issuing in respect of that estate without prior reference to him. Usually, the applicant would warn the caveator and after appearance has been entered to the warning, issue a writ. Thereafter, the action becomes contentious (see *The Law of Wills, Probate*

Administration and Succession in Malaysia and Singapore by Mahinder Singh Sidhu at p 226).

In the present case, the applicant has not entered a caveat but has applied to this court (vide encl 14) to be appointed as co-administrator de bonis non. The applicant is allowed to do so under O 71 r 22(2) and (4) of the RHC, which provides:

> (2) A dispute between persons entitled to a grant in the same degree must be brought by summons before the Registrar.
>
> (4) If the issue of a summons under this rule is known to the Registrar, he shall not allow any grant to be extracted until such summons is finally disposed of.

The applicant and the petitioner in the present case are both eligible to a grant and the applicant cannot agree to the petitioner being appointed the sole administrator. The petitioner, on the other hand, cannot agree to the applicant being appointed co-administrator. Therefore, a dispute has arisen and this matter falls under O 71 r 22(2) and (4) of the RHC. That being the case, the applicant's application (vide encl 14) was rightly filed. This court is empowered to hear and determine the issues or disputes raised on merits. However, on merits, as the court has decided earlier, the petitioner is the 'fittest' person to be appointed the sole administrator of the said estate.

Conclusion

Based on the above considerations, it is my judgment that the petitioner's application (vide encl 8) be allowed with costs and the applicant's application (vide encl 14) be dismissed with costs.

Petition allowed and application dismissed.

Reported by Zahid Taib